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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES COWAN, Defendant and Appellant.	D054635 (Super. Ct. No. SCS218147)

APPEAL from a judgment of the Superior Court of San Diego County, William H. McAdam, Esteban Hernandez, Judges. Reversed and remanded with directions.

I.

INTRODUCTION

James Cowan was driving a car with two passengers when a police officer lawfully stopped the car and approached Cowan's car on foot, accompanied by a police detective. While standing next to Cowan's car, the officer and the detective noticed the smell of burnt marijuana emanating from inside the car. The detective asked Cowan to get out of the car, conducted a warrantless search of Cowan's person, and found a small

amount of cocaine in his wallet. Cowan moved to suppress the cocaine. The trial court denied the motion to suppress. Cowan subsequently pled guilty to one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). The trial court suspended imposition of sentence and placed Cowan on probation for a period of three years.

On appeal, Cowan claims that the trial court erred in denying his motion to suppress. In *People v. Temple* (1995) 36 Cal.App.4th 1219, 1226 (*Temple*), the court held that the smell of marijuana emanating from a vehicle, and not connected to a particular occupant in the vehicle, does not provide probable cause to search the clothing of the vehicle's occupants. We conclude that *Temple* applies in this case, and that the detective lacked probable cause to search Cowan's person. We reject the People's alternative arguments for affirming, and reverse the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2008, the People charged Cowan with one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)).

In May 2008, Cowan filed a motion to suppress evidence pursuant to Penal Code section 1538.5. In his motion, Cowan claimed that the warrantless search of his person was unlawful because he had not consented to the search.

In their opposition to the motion to suppress, the People argued that the search of Cowan's person was lawful because the police had probable cause to search Cowan's car

and his person prior to conducting the search, and because Cowan had consented to search of his person.

In August 2008, a magistrate held a combined preliminary hearing and a hearing on Cowan's motion to suppress.[1] Chula Vista Police Department narcotics detectives Gino Grippo and Brandi Winslow, and Chula Vista Police Officer Wesley Manning, testified at the hearing.

Detectives Grippo and Winslow testified that at approximately 4:00 p.m. on March 18, 2008, they heard a call on their police radio that indicated that a person or persons suspected of smoking methamphetamine were in a white Saturn in the 300 block of Telegraph Canyon Road.[2] Shortly after they heard the radio call, the detectives saw a Saturn that matched the description. As the detectives approached the Saturn in their unmarked van, the Saturn began to move. The detectives followed the car in their van. The detectives could see that there were three people in the Saturn, and later determined that Cowan was the driver.

Officer Manning stated that on the afternoon of March 18 at approximately 4:00 p.m., he was on patrol in his marked patrol car. Officer Manning received a call over his police radio to go to 330 Telegraph Canyon Road for the purpose of investigating a white Saturn involved in possible narcotics activity. While Officer

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1 We refer to this hearing as the "preliminary hearing" for ease of reference.

2 Detective Grippo used the plural pronoun "they," in describing the suspects described in the radio call, while Detective Winslow stated that the call referred to a "subject" smoking methamphetamine.

Manning was responding to this address, Detectives Grippo and Winslow radioed Officer Manning that they were following the white Saturn. The detectives told Officer Manning that the windshield on the Saturn was cracked.

Officer Manning located the Saturn. After seeing that the front windshield of the car was cracked, Officer Manning initiated a traffic stop of the car. Officer Manning parked his patrol car behind the Saturn, and Detectives Winslow and Grippo parked their van behind Officer Manning's patrol car.

Officer Manning got out of his patrol car and approached the driver's side of the Saturn. As he reached the car, Officer Manning smelled the "odor of marijuana . . . emanating from inside the vehicle." Detective Winslow approached the car with Officer Manning and made contact with Cowan, who was the driver. Detective Winslow testified that she "smelled an odor of burn[t] marijuana coming from inside the car." Detective Winslow also said that she saw "residue marijuana" in the center console and that she had "previously seen open beer containers in the car."[3] Detective Winslow asked Cowan if she could look inside his car to make sure that there was nothing illegal in the car, such as drugs or weapons. Cowan declined Detective Winslow's request.

Less than thirty seconds after Officer Manning arrived at Cowan's car, Detective Grippo approached the car. Detective Grippo noticed an open can of beer in the seat pocket directly in front of a back seat passenger. Detective Grippo also smelled "the odor of burnt marijuana coming from inside the vehicle." Detective Grippo asked Cowan to

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[3] Detective Winslow clarified that she had seen the front and rear passenger each holding a beer car in Cowan's car, prior to the traffic stop.

get out of the car. Cowan complied, and Detective Grippo escorted Cowan to the rear of the car.

Detective Grippo testified that after he escorted Cowan to the rear of the car, Grippo asked Cowan if Cowan had been smoking marijuana. According to Detective Grippo, Cowan replied that he had been "smoking a blunt earlier."[4] Detective Grippo then asked Cowan whether he had any marijuana on him, and requested permission to search Cowan. According to Detective Grippo, Cowan replied that he did not have any marijuana and consented to a search of his person. Detective Grippo removed Cowan's wallet from his pocket and handed it to Detective Winslow. Detective Winslow searched the wallet and found a plastic bag that contained a small amount of cocaine. After Detective Winslow found the cocaine, Detective Grippo put handcuffs on Cowan and placed him in a police car. When Detective Grippo returned to Cowan's car, Officer Manning and Detective Winslow told him that there was loose marijuana in the center console of the car. Detective Grippo testified that he looked in the car and saw marijuana on the console.

At the conclusion of the preliminary hearing, the magistrate orally denied the motion to suppress and stated that the People had presented sufficient evidence for Cowan to answer the charges in the trial court. In ruling on the motion, the magistrate stated that it was clear that upon detecting the odor of marijuana coming from inside the car and seeing open containers of alcohol in the car, the police officers had the right "to

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4 Detective Grippo explained that "blunt" is a slang term for marijuana.

detain [Cowan] and question him further, to investigate the commission of a crime." The magistrate continued, "I am not as clear on the issue as to the consent at that point in time or whether or not there was a usable amount of marijuana that was even found subsequently." The magistrate concluded, "I am of the opinion that the fact that [the police officers] had smelled the marijuana as burnt marijuana, that that was sufficient probable cause to search [Cowan] . . . ."

In September 2008, Cowan filed a renewed motion to suppress in the trial court. In his renewed motion, Cowan claimed that he had not consented to the search of his person, and argued that the "mere odor of burnt marijuana is not a sufficient articulable fact alone to justify a total search of Mr. Cowan's person."

In their opposition to Cowan's renewed motion to suppress, the People contended that Cowan had consented to the search of his person. The People also argued that the police had probable cause to arrest Cowan for possession of a controlled substance, and that because probable cause to arrest Cowan existed, the search of his person was lawful. In making this argument, the People reasoned:

> "Upon approaching [Cowan]'s car, Detective Winslow smelled marijuana and saw fresh marijuana on the center console. [Citation.] After obtaining [Cowan]'s consent to search, Detective Winslow found a baggie of cocaine in [Cowan]'s wallet. . . . Therefore, Detective Winslow had probable cause to believe Defendant was in possession of a controlled substance in violation of Health and Safety Code section 11350."

The trial court held a hearing on Cowan's renewed motion to suppress.[5] At the hearing, the trial court heard argument from counsel and stated that it had reviewed the transcript of the preliminary hearing. At the conclusion of the hearing, the trial court orally denied Cowan's renewed motion to suppress. In making its ruling, the court stated, "I cannot find that there was a valid consent." However, the court concluded that the search of Cowan's person was lawful as a search incident to arrest. The trial court reasoned, "I disagree that the mere smell of the odor of burnt marijuana, as testified to in this case, would not justify or provide probable cause to arrest [Cowan] and to search the defendant incident to a lawful arrest." The trial court stated that the police had the right to search Cowan based on the "fact that they had smelled burnt marijuana, he was the driver of the vehicle, not a mere passenger in the vehicle."[6]

Cowan later pled guilty to one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and the trial court placed him on probation for a period of three years.

Cowan timely appeals.

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5 Judge McAdam, who acted as the magistrate at the preliminary hearing, also held a hearing on, and ruled on, Cowan's renewed motion to suppress.

6 Although the trial court did not explain why it believed it was significant that Cowan was the driver of the vehicle, the court may have been thinking of case law in which courts have held that the driver of a vehicle was in constructive possession of drugs found inside the vehicle. (See, e.g., *People v. Waller* (1968) 260 Cal.App.2d 131, 142 (*Waller*) ["'[The] rule is that when narcotics are found concealed in or about an automobile, at least where such automobile is in the possession of the owner or his entrustee, the trial court may infer knowledge on the part of the owner' [citation]"].) The People cite *Waller* in their brief on appeal. We address their argument in this regard in part III.C.2., *post*.

III.

DISCUSSION

The search of Cowan's person was unconstitutional; the evidence discovered pursuant to the search must be suppressed

Cowan claims that the trial court erred in denying his motion to suppress.

A. *Standard of review*

"Where, as here, a motion to suppress is submitted to the superior court on the preliminary hearing transcript, 'the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness.' [Citation.] 'We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment. [Citation.]' [Citation.] We affirm the trial court's ruling if correct under any legal theory. [Citation.]" (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033.)

B. *General principles of law governing searches and seizures*

"The Fourth Amendment guarantees individuals the 'right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' (U.S. Const., 4th Amend.) Under the Fourth Amendment, a warrantless search is unreasonable per se unless it falls within one of the 'specifically established and

well-delineated exceptions.' [Citation.]" (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1156-1157.) Thus, "police officers may not . . . search a suspect without probable cause and an exception to the warrant requirement . . . ." (*In re H.M.* (2008) 167 Cal.App.4th 136, 142.)

"The United States Supreme Court has interpreted the Fourth Amendment as requiring state and federal courts to exclude evidence that government officials obtained in violation of the amendment's protections." (*People v. Williams* (1999) 20 Cal.4th 119, 125.) "'Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution.' [Citation.]" (*People v. Robinson* (2010) 47 Cal.4th 1104, 1119.)

C. *There was not probable cause to search Cowan's person*[7]

Cowan claims that Detective Grippo lacked probable cause to search Cowan's person. Specifically, Cowan argues that the magistrate improperly concluded that the mere odor of burnt marijuana emanating from his car constituted probable cause to search his person.[8]

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7 Cowan concedes that Officer Manning lawfully stopped Cowan's vehicle to investigate the possibility that Cowan was driving with a cracked windshield, in violation of Vehicle Code section 26710.

8 In part III.D., *post*, we address the *trial court*'s conclusion that the search was lawful as a search incident to an *arrest*. In this section, we address the *magistrate*'s conclusion, echoed by the People in their brief on appeal, that "probable cause existed to *search* [Cowan] and his wallet for marijuana."

1. *Governing law*

Probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." (*Ybarra v. Illinois* (1979) 444 U.S. 85, 91.) In particular, there is a "unique, significantly heightened protection afforded against searches of one's person." (*Wyoming v. Houghton* (1999) 526 U.S. 295, 303.) Thus, it is well established that probable cause to search a car does not establish probable cause to conduct a search of the car's occupants. (*United States v. Di Re* (1948) 332 U.S. 581, 587 (*Di Re*).)

In *Temple, supra,* 36 Cal.App.4th at page 1226 the court applied *Di Re* and held that the odor of marijuana emanating from a van, not particularized to a particular occupant, did not provide probable cause to search the van's occupants. In *Temple,* a police officer, Officer Smith, stopped a van that had a broken taillight and had been weaving. (*Temple*, *supra*, 36 Cal.App.4th at p. 1222.) The driver got out of the van, and met Officer Smith at the rear of the van. (*Ibid*.) Officer Smith smelled the odor of burnt marijuana on the driver and directed the driver to get back into the van while the officer radioed for assistance. (*Ibid*.) After a second officer arrived, Officer Smith approached the driver's window of the van and noticed that all five occupants of the van were smoking cigarettes. (*Ibid*.) Over the smell of the cigarette smoke, Officer Smith detected the smell of unburnt marijuana coming from inside the van. (*Ibid*.) The assisting officer conducted a search of one of the passenger's clothing and wallet, and found a marijuana

pipe, marijuana, and methamphetamine. (*Ibid*.) The trial court granted the passenger's motion to suppress the evidence obtained from the search of his person, concluding that the "events preceding the search of Temple [the passenger] had not established a sufficient connection between him and the odor of marijuana in the van to justify searching him personally." (*Id.* at p. 1223.)

On appeal, the *Temple* court rejected the People's contention that "all passengers in a vehicle are automatically subject to a lawful search simply by virtue of their presence in a vehicle believed to be involved in criminal activity." (*Temple, supra*, 36 Cal.App.4th at p. 1226.) The *Temple* court summarized the People's arguments in support of their claim that the police had individualized suspicion to search of the car's occupants, as follows:

> "The People claim such individualized suspicion attached to all five occupants of the van in this instance because: '(1) they were driving around together at 2:00 in the morning; (2) there was a 'strong odor' of unburnt marijuana coming out the driver's window, suggesting a large amount of the substance; (3) all five occupants were smoking cigarettes inside the van within a few moments after the stop in a rather transparent attempt to camouflage the distinctive odor of the marijuana; and, most importantly, (4) there was no way for [Officer] Smith to know, at that point, whether the marijuana was on the occupants themselves, or in an area or compartment of the vehicle, or both. In other words, unlike a residential search warrant situation, *at the moment probable cause existed it necessarily encompassed everyone inside the van*.'" (*Temple, supra*, 36 Cal.App.4th at p. 1226.)

The *Temple* court found these arguments "unconvincing." (*Temple, supra*, 36 Cal.App.4th at p. 1227.) The court reasoned, "none of these factors served to connect [the defendant] in particular to the odor of marijuana." (*Ibid*.) The court noted, "There is no evidence [the defendant] was under the influence of the drug, he made no furtive

movements suggestive of an attempt to conceal contraband nor did he say anything of a particularly suspicious nature." (*Ibid*; accord *People v. Collier* (2008) 166 Cal.App.4th 1374, 1376 ["strong odor of marijuana" emanating from the passenger's side of a vehicle did not provide probable cause to arrest passenger for a drug offense, but did provide police officer with reasonable suspicion that the passenger was possessing or transporting drugs].)

The *Temple* court's conclusion that the smell of marijuana emanating from a vehicle does not provide probable cause to conduct a search of the vehicle's occupants is consistent with federal courts' interpretation of the Fourth Amendment. (See *U.S. v. Ramos* (3d. Cir 2006) 443 F.3d 304, 309, fn. 6 ["[C]ourts that have addressed the particularity requirement in the context of marijuana odor have established that the odor should be particularized to some specific person or place"].) For example, in *U.S. v. Humphries* (4th Cir. 2004) 372 F.3d 653, 659, the court stated:

> "In the case of a search, when the odor [of marijuana] emanates from a confined location such as an automobile or an apartment, we have held that officers may draw the conclusion that marijuana is present in the automobile or the apartment. [Citations.] *But probable cause to believe that marijuana is located in an automobile or an apartment may not automatically constitute probable cause to arrest all persons in the automobile or apartment; some additional factors would generally have to be present, indicating to the officer that those persons possessed the contraband*." (Italics added.)

2. *Application*

In this case, as in *Temple*, there was nothing that "served to connect [Cowan] in particular to the odor of marijuana" in the car. (*Temple, supra*, 36 Cal.App.4th at p. 1227.) None of the police officers testified that they were able to connect the odor to

Cowan, and there was no evidence of any "additional factors" (*U.S. v. Humphries*, *supra*, 372 F.3d at p. 659) that tied the odor of marijuana to Cowan, such as furtive movements or physical manifestations of recent drug use. (*Temple, supra*, 36 Cal.App.4th at p. 1227.) The passenger in *Temple* was among five passengers smoking cigarettes just prior to the search — an action that could have been construed as an attempt to mask the smell of marijuana. (*Temple, supra*, 36 Cal.App.4th at p. 1227.) Despite this conduct, the court found no probable cause to search the passenger. (*Id*. at pp. 1222, 1227.) In this case, in contrast, there was no testimony that Cowan took any action whatsoever that could be construed as an attempt to conceal contraband. Further, in this case, there were no objective factors that could have led Detective Grippo to conclude that marijuana would be found on Cowan's *person*, as opposed to elsewhere in the car.

We reject the People's argument that *Temple* is distinguishable because *Temple* involved the search of a passenger, while this case involves a search of the driver. The *Temple* court expressly based its holding on the lack of any connection between the odor of contraband and the person to be searched. (*Temple, supra*, 36 Cal.App.4th at p. 1227.) That rationale fully applies in this case and is consistent with well established United States Supreme Court case law holding that probable cause must be particularized to the person and/or place to be searched. (*Illinois v. Gates, supra*, 462 U.S. at p. 238; *Ybarra v. Illinois, supra*, 444 U.S. at p. 91.) Specifically, we reject the People's suggestion that cases such as *Waller, supra*, 260 Cal.App.2d at page 142, in which courts have held that the driver of a vehicle was in constructive possession of drugs found inside the vehicle, provides a basis for distinguishing *Temple.* The basis of the holdings in these cases is

that the driver is deemed to have dominion and control *of a vehicle*, and therefore, is presumed to know about any contraband hidden in the *vehicle*. These cases in no way undermine the rationale of *Temple*, which is based on the lack of a connection between an odor of contraband and the fair probability that evidence of the contraband will be found on a particular *person*. Accordingly, applying *Temple*, we cannot conclude that Detective Grippo had probable cause to believe that he would find marijuana on Cowan's *person*.

We reject all of People's additional arguments in support of their claim that Detective Grippo had probable cause to search Cowan's person. First, the People note that courts have held that a police officer has probable cause to search a *vehicle* for marijuana after the officer smells the odor of marijuana in the vehicle during a traffic stop. We agree, but this case law is irrelevant. Cowan is challenging the search of his *person*, not his *vehicle*, and the United States Supreme Court has squarely held that probable cause to search a vehicle *does not establish* probable cause to search the vehicle's occupants. (*Di Re, supra,* 332 U.S. at p. 587.)[9]

Next, we reject the People's suggestion that the strength of the odor of marijuana emanating from Cowan's car provided Detective Grippo with probable cause to search Cowan. The People object to Cowan's description of the odor of the marijuana as "faint," noting that Detective Winslow characterized the smell as "not strong," and argue that "'not strong' . . . is not the equivalent of 'faint.'" Regardless of whether the smell was

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9 The People acknowledged as much in the trial court. The prosecutor stated, "The fleeting targets [exception to the warrant requirement] get[s] to [the] entire vehicle, including all closed containers. It does not get you the occupants of the car."

"faint," or rather, "not strong," (and assuming that there is a difference between these two descriptions), there was no testimony that connected the odor to Cowan. Thus, the People's quibbling over the correct description of the pungency of the odor does not demonstrate that Detective Grippo had probable cause to search Cowan's person.

We also reject the People's contention that Detective Winslow's testimony that she saw loose marijuana in the center console of the car establishes that Detective Grippo had probable cause to search Cowan.[10] The People cite no authority for the proposition that one officer's knowledge of facts, not communicated to a second officer, may serve as the basis for the second officer's decision to conduct a warrantless search. In this case, it is undisputed that Detective Grippo was unaware of the alleged loose marijuana in the car at the time he searched Cowan.[11] We conclude that Detective Winslow's alleged observation of loose marijuana in the center console of the car is not relevant in determining whether Detective Grippo had probable cause to search Cowan.

We also reject the People's argument that Detective Grippo's vague testimony that Cowan allegedly stated that he had smoked marijuana "earlier," established probable cause for Detective Grippo to believe that Cowan had marijuana concealed on his person

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10 Whether there was in fact visible loose marijuana in the car is disputed; the magistrate specifically declined to render a factual finding on this issue. (See part III.F., *post*.)

11 The People appear to have abandoned their suggestion, advanced in their opposition to Cowan's renewed motion to suppress, that Detective Winslow conducted the search of Cowan's person. In their brief in this court, the People state, "During the course of his search of [Cowan] Detective Grippo withdrew [Cowan's] wallet from his pocket and handed it to Detective Winslow."

at the time of the search.[12] While Cowan's statement may have established probable cause to believe that Cowan had possessed marijuana at some undefined earlier point in time, it did not establish probable cause to believe that evidence of that crime would be found on his person at the time Detective Grippo searched him. (See *Illinois v. Gates*, *supra,* 462 U.S. at p. 238 [probable cause to search exists where there is "a fair probability that contraband or evidence of a crime will be found in a particular place"].)

We reject the People's suggestion that the radio call describing a person or persons smoking *methamphetamine* provided probable cause to search Cowan's person for *marijuana*. (See *People v. Gotfried* (2003) 107 Cal.App.4th 254, 265 ["'Any rookie officer knows uncorroborated, unknown tipsters cannot provide probable cause . . . .'"]; compare with *People v. Wells* (2006) 38 Cal.4th 1078, 1083 ["Reasonable suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause, including an anonymous tip"].) Finally, we reject the People's unexplained contention that the presence of open containers of beer in Cowan's car is relevant in determining whether Detective Grippo had probable cause to search Cowan's person for marijuana.

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12 The magistrate did not find that Cowan made such a statement.

Accordingly, we conclude that Detective Grippo lacked probable cause to search Cowan's person.[13]

D. *The search of Cowan's person was not lawful as a search incident to arrest*

The People contend that we may affirm the trial court's order on the ground that the search was lawful as a search incident to arrest. The People maintain that at the time Detective Grippo searched Cowan, police had probable cause to arrest Cowan for possessing marijuana (Health & Saf. Code, § 11357), driving with a cracked windshield (Veh. Code, § 26710), and for having open containers of alcohol in his car (Veh. Code, § 23121). Quoting *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536, the People argue, "Once there is probable cause for an arrest it is immaterial that the search *preceded the arrest*." (Italics added.) We are not persuaded. It is undisputed that Cowan was *never* arrested for any of the offenses for which the People claim police had probable cause to arrest him, and the People cite no case law that supports the view that a warrantless search may be justified by a hypothetical arrest that did not in fact occur.[14]

In *United States v. Robinson* (1973) 414 U.S. 218, 224 (*Robinson*), the United States Supreme Court held that a criminal defendant may be subjected to a warrantless search incident to a lawful arrest. The People correctly note that where a formal arrest

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13 "Police officers may not . . . search a suspect without probable cause *and* an exception to the warrant requirement . . . ." (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 142, italics added.) In light of our conclusion that Detective Grippo lacked probable cause to believe that Cowan had marijuana concealed on his person, we need not consider whether an exception to the warrant requirement existed.

14 In discussing this theory in the trial court, the prosecutor stated, "He was not arrested. We concede that."

follows "quickly on the heels of the challenged search of petitioner's person, . . . it [is not] particularly important that the search preceded the arrest rather than vice versa. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 (*Rawlings*).) "The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest." (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1239-1240.)

In contrast, in *Knowles v. Iowa* (1998) 525 U.S. 113 (*Knowles*), the United States Supreme Court "held that the exception for a search incident to a custodial arrest could not be applied where no custodial arrest had occurred." (*People v. McKay* (2002) 27 Cal.4th 601, 613, fn. 6.) In *Knowles*, a police officer stopped the defendant for speeding. (*Knowles, supra*, 525 U.S. at p. 115.) Under Iowa law, the officer had the option to either arrest the defendant for the speeding offense, or issue him a citation. (*Ibid*.).) The officer issued the defendant a citation for speeding. (*Ibid*.) After issuing the citation, the officer conducted a search of the defendant's car and found drugs and drug paraphernalia. (*Ibid*.) The defendant moved to suppress the evidence on the ground that the "the search could not be sustained under the 'search incident to arrest' exception recognized in [*Robinson, supra*, 414 U.S. 218], because he had not been placed under arrest." (*Knowles, supra*, 525 U.S. at p. 113.) The trial court denied the motion, and the Iowa Supreme Court affirmed, "reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest." (*Id*. at pp. 115-116.)

The United States Supreme Court reversed, reasoning:

> "In *Robinson*, we held that the authority to conduct a full field search as incident to an arrest was a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that 'bright-line rule' to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so." (*Knowles, supra*, 525 U.S at pp. 118-119.)

Assuming, without deciding, that the police had probable cause to arrest Cowan for possessing marijuana (Health & Saf. Code, § 11357), driving with a cracked windshield (Veh. Code § 26710), and/or for having open containers of alcohol in his car (Veh. Code § 23121), their subsequent search of his person cannot be justified as a search incident to arrest for any of these offenses, because Cowan was never *in fact* arrested for any of these offenses. (*Knowles, supra*, 525 U.S. at p. 115.) Thus, cases in which courts have upheld searches conducted *prior* to an arrest (e.g., *Rawlings, supra*, 448 U.S. at p. 111), are inapplicable. (See *People v. Mckay, supra*, 27 Cal.4th at p. 613 fn. 6; *U.S. v. Powell* (D.C. Cir. 2007) 483 F.3d 836, 841 [applying *Rawlings* to conclude that search conducted prior to arrest was lawful and stating, "[h]ad the officers failed to arrest

[defendant] and merely issued him a citation, then indeed the search would be invalid under *Knowles*]".)[15]

In a similar vein, although the People are correct that in *Atwater v. Lago Vista* (2001) 532 U.S. 318 (*Atwater*) the United States Supreme Court held that police may arrest a person for "even a very minor criminal offense" without violating the Fourth Amendment (*id*. at p. 354), *Atwater* is inapposite because Cowan was *not* arrested for any of the offenses for which the People claim the police had probable cause to arrest him.[16] We are similarly not persuaded by the People's claim that the search in this case is lawful, presumably as a search incident to a *de facto* arrest, under *People v. Gomez* (2004) 117 Cal.App.4th 531 (*Gomez*). In *Gomez*, the court considered whether an unreasonably long detention constituted a de facto arrest without probable cause. (*Id*. at p. 537.) The police stopped the defendant's car for an alleged seatbelt violation. Police detained the defendant for over an hour prior to conducting a search of his car that revealed evidence of drug trafficking. (*Id*. at p. 536.) The *Gomez* court rejected the defendant's argument

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15 The People's contention that *Knowles* is distinguishable on the ground that in that case, the United States Supreme Court purportedly "invalidated a state statute that authorized a full scale search upon the issuance of a traffic citation" is not persuasive. The *Knowles* court specifically rejected the state's contention that the defendant's argument was restricted to a facial challenge of the statute's validity. (*Knowles, supra*, 525 U.S. at p. 116.)

16 It is undisputed that the People did not have probable cause to arrest Cowan for possessing cocaine (Health & Saf. Code, § 11350, subd. (a)) prior to conducting the search of his wallet. Thus, the People properly do not argue that the search was lawful as a search incident to Cowan's arrest for possessing cocaine (§ 11350, subd. (a)). (See, e.g., *Sibron v. New York* (1968) 392 U.S. 40, 63 ["It is axiomatic that an incident search may not precede an arrest and serve as part of its justification"].)

that the detention constituted an unlawful de facto arrest without probable cause, because, the court concluded, police had probable cause to arrest the defendant for drug trafficking *prior* to the detention. (*Id*. at p. 538.) In addition, citing *Atwater*, the *Gomez* court held that the alleged seatbelt violation that led to the initial detention constituted an alternative ground for concluding the prolonged detention was lawful. (*Gomez, supra*, 117 Cal.App.4th at p. 538.)

This alternative holding of *Gomez* is distinguishable because the defendant in *Gomez* challenged his *detention*, not the *search*. (*Gomez, supra*, 117 Cal.App.4th at p. 538.) The *Gomez* court applied *Atwater*, and neither considered nor cited *Knowles,* in which the United States Supreme Court refused to extend the warrant exception applicable to a search incident to arrest to a hypothetical arrest that could have, but did not, occur. Accordingly, we conclude that *Knowles* controls in this case, rather than *Atwater* and its progeny, *Gomez*.

E. *There is substantial evidence to support the finding that the People did not demonstrate that Cowan voluntarily consented to the search*

The People contend that we may affirm the trial court's order on the alternative ground that Cowan consented to the search. Specifically, the People claim that there is not substantial evidence in the record to support the finding that the People did not establish that Cowan voluntarily consented to the search of his person.

1. *Factual and procedural background*

At the preliminary hearing, Detective Winslow testified that she approached Cowan's car with Officer Manning. Cowan was seated in the driver's seat. Detective

Winslow asked Cowan for his consent to a search of his car, and Cowan refused to consent to the search.

After Cowan declined Detective Winslow's request, Detective Grippo told Cowan to get out the car. When Cowan got out of the car, Detective Grippo escorted Cowan to the rear of the car. At that point, Detective Grippo asked Cowan for his consent to a search of his person. According to Detective Grippo, Cowan agreed to submit to a search of his person. Detective Grippo proceeded to remove Cowan's wallet from his pocket and handed it to Detective Winslow, who was standing next to Detective Grippo.

Detective Winslow testified that she heard Cowan consent to Detective Grippo's request to search him. Detective Winslow searched Cowan's wallet and found a plastic bag that contained a small amount of cocaine. Detective Grippo testified that he had not heard Cowan refuse Detective Winslow's request for consent to search his car.

At the conclusion of the preliminary hearing, the magistrate stated that he was not "clear" on the issue of consent. At the conclusion of the hearing on the renewed motion to suppress, the trial court specifically concluded that the People had not established that Cowan voluntarily consented to the search.[17] In reaching this conclusion, the trial court stated:

> "I stand by a statement that I made [at the preliminary hearing], and I would not change that statement where I said am not clear on the issue as to consent. I am still unclear. Since I am unclear, I cannot find that there was a valid consent. [¶] So the position of the District Attorney's office [is] that there was a valid consent[.] I want to

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17 As noted previously, the same judge ruled on both the initial motion to suppress at the preliminary hearing and the renewed motion to suppress.

> make it clear that I am not denying the motion based upon the fact that there was a valid consent.

2. *Governing law*

"A recognized exception to the Fourth Amendment's proscription against warrantless searches is a search that is based upon consent. [Citation.]" (*People v. Superior Court* (2006) 143 Cal.App.4th 1183, 1198.) "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 (*Schneckloth*).) "The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings ─ whether express or implied ─ must be upheld if supported by substantial evidence.' [Citations.]" (*People v. James* (1977) 19 Cal.3d 99, 107 (*James*).)

3. *Application*

The precise basis for the magistrate's statement that the magistrate was unclear as to whether Cowan consented to the search is, itself, not clear from the record. The magistrate may have disbelieved Detective Winslow's and Detective Grippo's testimony that Cowan gave Detective Grippo consent to search his person. Such a finding would be fully within the magistrate's authority as the trier of fact to judge the credibility of these witnesses. (*James, supra*, 19 Cal.3d at p. 107.)

In the alternative, assuming that the magistrate believed Detective Winslow's and Detective Grippo's testimony that Cowan manifested his consent to the search, the magistrate may have reasonably found that such consent was a product of implied coercion. (*Schneckloth, supra*, 412 U.S. at p. 227.) In considering the "totality of the circumstances" (*ibid*.), the magistrate could have reasonably found that the officers' actions created a coercive climate in which Cowan's consent was not freely given, based on the fact that after Cowan initially refused to consent to a search of his car, he was directed to get out his car and was then asked to consent to a more intrusive search of his person. Under these circumstances, the magistrate could have reasonably found that Cowan's consent was the product of implied coercion.

We conclude that there is substantial evidence to support the magistrate's implied finding that the People did not demonstrate that Cowan voluntarily consented to the search.

F. *This court may not affirm the trial court's order on the basis of the inevitable discovery doctrine because the People failed to raise the doctrine in the trial court as a basis for denying the motion suppress, and the record on appeal does not establish the factual predicate on which the People claim the doctrine applies*

The People claim, for the first time on appeal, that even assuming that the seizure of the cocaine was illegal, the cocaine may be introduced at trial pursuant to the inevitable discovery doctrine. Specifically, the People claim, "If for some reason this Court were to find probable cause had yet to be established at the time of the search because Detective Grippo was unaware of loose leaf marijuana, the inclusion of marijuana in appellant's car would tip the scales to a finding of probable cause." The

People theorize that, upon learning of the alleged presence of loose marijuana in Cowan's car, the officers would have had probable cause to search Cowan's person, would have conducted such a search, and would have found the cocaine in his wallet.

1. *Governing law*

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' [Citation.] The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 789, 800 (*Robles*).)

"The burden of establishing that illegally seized evidence is admissible under the [inevitable discovery doctrine] rests upon the government. [Citations.]" (*Robles, supra*, 23 Cal.4th at p. 801, fn. omitted.) If the People fail to present the inevitable discovery doctrine to the trial court, the doctrine "may be applied on appeal if the factual basis for the theory is fully set forth in the record." (*Ibid*.) More specifically, the inevitable discovery doctrine may be applied on appeal where the record fully establishes the doctrine as a "basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory." (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138-139 (*Green*).) Thus, where it is clear on appeal that the inevitable discovery doctrine applies, a reviewing court may apply the

doctrine to affirm a trial court's denial of a motion to suppress. (*Id*. at p. 138 ["[T]o close our eyes to the clear applicability of the inevitable discovery doctrine would run contrary to the settled principle of appellate review that a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasoning"].)

2. *Factual and procedural background*

At the preliminary hearing, Detective Grippo testified that, after searching Cowan, Detective Winslow and Officer Manning told him that there was loose marijuana in the center console of Cowan's car. Detective Grippo said that he looked into the car and saw fresh marijuana in the center console. Detective Grippo said that the marijuana "[looked] like loose leaves," and that it "appeared to be debris that is commonly left over when somebody would roll a marijuana cigarette or a joint." Detective Grippo claimed that the quantity of marijuana that he saw constituted a usable amount.

Detective Winslow testified that she saw "residue marijuana" in the center console of the car. On cross-examination, defense counsel asked Detective Winslow whether the quantity of marijuana that she saw on the console was "citable." Detective Winslow replied, "Some people cite for that." Detective Winslow acknowledged that the officers had not collected the marijuana as evidence, but stated that she had photographed the marijuana.

The defense introduced in evidence photographs of the alleged marijuana as preliminary hearing exhibits A and B. In arguing in favor of the motion to suppress, defense counsel argued:

> "Loose marijuana in the console. You [have] got exhibit A and B there. Let's employ some reasonable common sense here. Does what you see in the picture give an officer permission to search somebody inside and out, search their wallet without their consent. If you think it does, I have nothing to say."

Defense counsel further argued:

> "If the facts were different, which they are not, if Mr. Cowan was taken out of his car and they saw visible marijuana, unsmoked, smokable drugs enough for personal use that you could scrape together if somebody wanted to, and if he was arrested for that ─ I think the testimony was it could be citable, depending upon, I guess, who you are.
>
> "If he ha[d] been arrested for misdemeanor possession, then yes, but he wasn't. That big color picture I think is exhibit B. Put on your reasonable hat and tell me if that is marijuana in plain view. Remember, the picture was taken for the purpose of documenting, not whether it is a standard transmission or automatic transmission, but the marijuana residue."

At the conclusion of the preliminary hearing, in ruling on the motion to suppress, the magistrate stated, "I am not as clear on the issue as to the consent at that point in time or whether or not there was a usable amount of marijuana that was even found subsequently." The magistrate made no other reference to the alleged marijuana in its ruling on Cowan's motion to suppress. Nor did the trial court make any reference to the alleged marijuana in its ruling on Cowan's renewed motion to suppress.

The People did not raise the inevitable discovery doctrine in either their opposition to Cowan's initial motion to suppress, or in their opposition to Cowan's renewed motion to suppress.

3. *Application*

In order for this court to apply the inevitable discovery doctrine for the first time on appeal, it must have "clear applicability" to this case. (*Green, supra,* 40 Cal.3d at p. 138.) The "factual basis for the theory," must be "fully set forth in the record." (*Robles, supra,* 23 Cal.4th at p. 801, fn. 7.)

To prevail on their theory that the presence of "scattered marijuana on the console" of Cowan's car renders the doctrine applicable in this case, the People must, as a threshold matter, have carried their burden of proving that such marijuana was in fact present in Cowan's car. We cannot conclude that is the case. The issue was hotly disputed at the preliminary hearing. The marijuana was not introduced in evidence. Defense exhibits A and B — the photographs of Cowan's console — show small white flecks on the console that do not appear to be marijuana.[18] Neither the magistrate nor the trial court rendered any clear finding on this issue.

We conclude that we may not affirm the trial court's order on the basis of the inevitable discovery doctrine, because the record on appeal does not establish the factual predicate for the applicability of the doctrine.

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18 The photographs have been transmitted to this court pursuant to California Rules of Court, rule 8.224, and we have examined them.

IV.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court with directions to permit Cowan to withdraw his guilty plea, to vacate its order denying the motion to suppress, to enter a new order granting the motion to suppress, and to undertake any other necessary proceedings in accordance with applicable law.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.